United States Court of Appeals

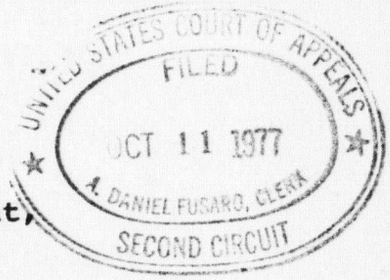
for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

76-6152

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-6152



UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

VARIOUS ARTICLES OF OBSCENE MERCHANDISE
SCHEDULE NO. 1303,

Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District of New York

PETITION FOR REHEARING AN.
SUGGESTION FOR REHEARING EN BANC

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Preliminary Statement

The claimant-appellee, Bruce Long, pursuant to Rules 35 and 40, Federal Rules of Appellate Procedure, respectfully petitions this court for a rehearing or a rehearing en banc of a decision rendered on September 15, 1977.* In an opinion by Circuit Judge Moore, joined by Circuit Judge Smith, and with

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*By order dated September 27, 1977, the Court extended the time for filing this petition to and including October 10, 1977. That date being a legal holiday, this petition was timely-filed on October 11, 1977.

Circuit Judge Mulligan filing a concurring opinion, the panel reversed and remanded a judgment of the United States District Court for the Southern District of New York (Hon. Marvin E. Frankel). The panel's opinion appears at pp. 5935-5950 of this Court's slip opinions.

This case involves the constitutionality under the First and Fifth Amendments of the procedural regime by which the Government administers and enforces 19 U.S.C. Section 1305, providing for seizure, forfeiture and destruction of obscene material imported from abroad. In this case, the material seized was a pamphlet sent to claimant, who resides in Lancaster, Pennsylvania, by a friend in West Germany, and seized en route by customs officials here in New York. But, as the record so vividly reflects, this case typifies the procedures used for the enforcement of the statutory prohibition on the importation of obscene materials, which is essentially a system of enforcement by default. Of the 573 addressees--residing all over the country--whose material was seized as allegedly obscene on the same schedule as the claimant, only 14 even filed an administrative claim contesting the Customs' determination, and only one--the claimant--appeared in court. That pattern is repeated in dozens of cases in the Southern District each year, with the result that thousands of people have their rights under the First Amendment unilaterally determined by government officials because it is prohibitively burdensome for those persons to journey to the Southern District of New York,

examine the allegedly obscene material addressed to them, obtain counsel, all in order to contest the official claim that a brochure or a magazine is legally obscene.

District Judge Frankel addressed himself to the issues raised by this system and held that the enforcement procedures under the statute offend the First Amendment in two respects: "in (a) depriving claimants and their local communities of the freedom to read and see things in accordance with their own standards of what is or is not obscene, and (b) failing to afford a less onerous and expensive procedure for the vindication of First Amendment claims to items seized." He therefore dismissed the Government's complaint on both grounds, because the Government had failed to prove the pamphlet obscene under the community standards of Lancaster, Pennsylvania, and because the Government failed to notify the claimant of his constitutional right to have the proceedings transferred to the district of his residence.

The Government appealed, and the claimant urged this Court to affirm on both grounds. The panel decision, however, dealt almost exclusively with the first issue, namely, the question of the appropriate "community standards" for judging the obscenity of seized material. The Court held (1) that the procedures utilized in this case were consonant with the statute (slip opinion at 5942-43); (2) that under

Section 1305 the difficult task of determining "community standards" did not have to be made by reference to the community where the addressee resides, but could be judged by the standards of the Southern District of New York, where the material was seized (slip opinion at 5943-48); and (3) that this result was permissible in light of the "plenary power" of Congress to prohibit importation of obscene materials from abroad (slip opinion at 5943-44).

For the following reasons, the claimant respectfully suggests that this decision should be reheard or reheard en banc.

I.

The panel overlooked or misapprehended the claimant's primary arguments that the statute offends the strict procedural requirements imposed by the First Amendment when material is seized or information is suppressed on the allegation that it is obscene.

The District Court holding had two elements: (1) that as a matter of substantive First Amendment law, the obscenity vel non of material under Section 1305 had to be determined by the standards of the addressee's community, where the material would be used, rather than the happenstantial port of entry where it was seized; and (2) that as a matter of procedural First Amendment protections, requiring that issue to be adjudicated in this District was impermissibly burdensome.

Summarizing the District Court's holding on this second ground, the panel said the holding was "that the claimant had the right to have his claim referred to the district of his residence or that of the article's destination." (Slip opinion at 5942) The panel characterized its task in this case as "limited to interpreting and enforcing the statute reflecting Congress's (and presumably the People's) will." (slip opinion at 5942) A few sentences later, the court concluded that "Nothing in the statute, by implication or otherwise, indicates or justifies reference for adjudication to the district of the addressee's residence. Interesting though such a procedure might be to the prosecutors and judges in the hinterland, it would be without statutory authority." (slip opinion at 5943)(emphasis added)

These comments do not accurately reflect the claimant's position. The conclusion rejects an argument never made, namely, that the statute itself "indicates or justifies" transfer of the forfeiture proceedings to the addressee's home district. And the conclusion fails to mention the pivotal argument that claimant did make: that the procedures under the statute violate the First Amendment because they fail to afford less onerous and expensive procedures to vindicate the First Amendment claims to items seized. In other words, claimant maintains that the First Amendment, not the statute, requires the less onerous procedures, namely, permitting the

claimant to request proceedings in the district where the claimant resides. Whether or not the First Amendment does require that was an issue which the panel did not resolve.

II.

The panel's decision, by misapprehending or overlooking the claimant's procedural First Amendment arguments, has sustained procedures which conflict with relevant Supreme Court precedent. The substantive power of both the Congress and the States to regulate obscenity in any manner chosen is circumscribed by the First Amendment and the procedural safeguards which must surround any particular determination that First Amendment protections are not available. See, e.g., United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971); Blount v. Rizzi, 400 U.S. 410 (1970); Freedman v. Maryland, 380 U S. 51 (1965). Thus, not only may Congress not substantively abridge First Amendment rights, but it may not authorize or establish procedures that unduly impair those rights. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 497 (1962). To the extent the Section 1305 procedures violate the First Amendment, the Section must be either declared unconstitutional or construed to comport with the constitutional requirements.

Our position here is very similar to that adopted by the Supreme Court in United States v. Thirty-Seven (37) Photo-

graphs. There, the Court held that, to comply with First Amendment procedural safeguards, Section 1305 must have strict time limits. The Court therefore superimposed on that section specific time limits for starting and concluding the forfeiture proceedings, though the statute itself was silent about such limits. Likewise, we submit here that the First Amendment requires superimposition on Section 1305 of a claimant's right to have the proceedings against his seized property heard in his home district.

Until judicially declared obscene, allegedly obscene materials are deemed to be protected by the First Amendment. Thus, to protect First Amendment rights, procedures for determining obscenity vel non must meet very strict safeguards. The statute here does not meet those requirements. It embodies a system of prior administrative censorship, see Freedman v. Maryland, supra; Southeastern Promotions, Limited v. Conrad, 420 U.S. 546 (1975); it imposes burdensome requirements on the vindication of First Amendment rights, see Freedman v. Maryland, supra; Blount v. Rizzi, supra; Lamont v. Postmaster General, 381 U.S. 301 (1965); and it impermissibly discourages the availability of a prompt judicial determination of obscenity vel non: ". . . if judicial review is made unduly onerous, by reason of delay or otherwise, the [censor's] determination in practice may be final." Southeastern Promotions, Ltd. v. Conrad, supra, 420 U.S. at 561 (emphasis added). Because Section 1305 forfeiture proceedings are brought in this dis-

trict, even though the addressees reside all across the country, very few of them have the meaningful opportunity to be heard, which is a general requirement of due process and a specific requirement where First Amendment rights are being adjudicated. In the context here, such rights are effectively being denied.

The District Court's decision was a careful and modest attempt to remedy these constitutional defects by requiring that claimants be permitted to have the substantive issues heard in their home district. In practice, few would probably take advantage of that right, but the First Amendment requires that they be afforded the opportunity. The panel's decision, reversing this ruling without addressing these issues, should be reconsidered.

III.

The panel's decision is inconsistent with and overlooks constitutional principles recently ennunciated by the Supreme Court in Shaffer v. Heitner, ___ U.S. ___, 97 S.Ct. 2569 (June 24, 1977), in which the Court changed the standards for determining whether a state has the power to adjudicate personal rights to property located in the state.

The forfeiture proceedings under Section 1305 are in rem proceedings, which are commenced and concluded in the port-of-entry district into which the seized materials happened to land. Generally, neither the property nor its

addressee-claimant has any connection whatever with the port-of-entry district, except that the mail route for the property happened to pass through that district. Nevertheless, claimants from all over the United States are forced either to forfeit their property or to journey to that district to personally defend their property.

The claimant contended that the Section 1305 procedures violate his due process as well as First Amendment rights. (Brief at 22-23) After that brief was submitted, the Supreme Court decided the landmark due process case of Shaffer v. Heitner, supra. The panel did not discuss the implications of Shaffer, or for that matter, claimant's due process contention; yet the principles announced in Shaffer substantially bolster his position.

Before Shaffer, in rem proceedings were based on the premise that a proceeding against property was not a proceeding against the owners of the property. Such proceedings could therefore be brought against property wherever it could be found, without regard to the relationship of the underlying dispute and the property owner to the forum. The Court in Shaffer changed all that, by recognizing that "jurisdiction over a thing" is an elliptical way of referring to "jurisdiction over the interests of persons in a thing." 97 S.Ct. at 2581. "The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with

the Due Process Clause is the minimum contacts standard elucidated in International Shoe." 97 S.Ct. at 2582. Under Shaffer, therefore, the mere presence of property in a jurisdiction, though relevant to the existence of the required minimum contacts, does not conclusively establish jurisdiction over the property.

The Shaffer principles are applicable here. Under the existing section 1305 procedures, the in rem forfeiture proceedings take place entirely in the port-of-entry, merely because the seized property happened to be passing through that port. The claimant who lives outside the port-of-entry district may have no contacts whatever with that district. And the fact that the controversy is over the seized materials themselves does not add to the "contacts" with that district because the claimant generally never asked for or expected his property to be there. In these circumstances, it is a denial of "fair play and substantial justice," 97 S.Ct. at 2581, to require a section 1305 claimant to journey to a distant jurisdiction to defend his property, particularly when that property is presumptively protected by the First Amendment and when less drastic means are available to serve the Government's interests.

IV.

The panel decision improperly relied on the "plenary power" of Congress over foreign commerce in sustaining the procedures employed in the enforcement of Section 1305.

Running throughout the panel's opinion is the theme that, since the statute deals with materials from abroad, the Congress had greater leeway in the procedures that it provides to regulate such materials. That ruling is inconsistent with at least two Supreme Court decisions which hold that Congress may not exercise its foreign commerce power through procedures that unduly burden First Amendment rights. In Lamont v. Postmaster General, supra, the Court invalidated procedures, established under Congress' postal powers, which made it difficult in practical terms for addressees to receive political propaganda from abroad. More relevantly, in United States v. Thirty-Seven (37) Photographs, supra, the Court held that Section 1305 itself would be constitutionally infirm if not construed to require strict time limits in obtaining a judicial decision on the obscenity of material sought to be imported. Subsequent dictum in United States v. 12 200-ft. Reels of Super 8 MM. Film, 413 U.S. 123 (1973) does not undercut the thrust of these decisions.

Congress may have broad power to prohibit the importation of obscene material, but the methods by which it exercises that power must be subjected to the closest scrutiny.

CONCLUSION

For the foregoing reasons, the panel decision should be reheard or reheard en banc.

Respectfully Submitted,

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October 11, 1977

CERTIFICATE OF COUNSEL

I, Joel M. Gora, attorney for Bruce Long, the claimant-appellee, do hereby certify that the foregoing petition for rehearing and suggestion for rehearing en banc is presented in good faith and not for purposes of delay.

JOEL M. GORA

Certificate of Service

I, Joel M. Gora, hereby certify that service of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc was made upon the United States by mailing two copies thereof, postage prepaid and by first class mail, this 11th day of October, 1977 to:

Frederick P. Schaffer
Assistant United States Attorney
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Joel M. Gora
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October 11, 1977